Date: February 11, 1998

Case No.: 96-INA-00215

In the Matter of:

NATHAN AND TAMMY TSANG,
Employer

On Behalf Of:

MIN M. ZHANG,
Alien

Appearance: William B. Bennett, Esq.
For the Employer/Alien

Before: Huddleston, Lawson and Neusner
Administrative Law Judges

RICHARD E. HUDDLESTON
Administrative Law Judge

DECISION AND ORDER

The above action arises upon the Employer's request for review pursuant to 20 C.F.R. § 656.26 (1991) of the United States Department of Labor Certifying Officer's ("CO") denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to § 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) ("Act"), and Title 20, Part 656, of the Code of Federal Regulations ("C.F.R."). Unless otherwise noted, all regulations cited in this decision are in Title 20.

Under § 212(a)(5) of the Act, as amended, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified, and available; and, (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good-faith test of U.S. worker availability.

We base our decision on the record upon which the CO denied certification and the Employer's request for review, as contained in an Appeal File,[1] and any written argument of the parties. 20 C.F.R. § 656.27(c).

Statement of the Case

On March 30, 1994, Nathan and Tammy Tsang ("Employer") filed an application for labor certification to enable Min M. Zhang ("Alien") to fill the position of Educational Tutor (AF 38-39). The job duties for the position are:

> Provides a complete program of private instruction for three children, ages 2, 4 and 6 years old,[2] in the Mandarin language and traditions, including: complete written and oral (both formal and conversational) communication skills, history and traditions in the private home. Assigns Mandarin literature for the children to read at the appropriate level in order to expand their vocabulary. Accompanies children to museums, performing art events, zoos and other educational establishments when parents are unavailable. Prepares lesson plans and confers with parents on the plans and the progress of each child.

The requirements for the position are two years of experience in the job offered or two years of experience as a Preschool Teacher. In addition, the Employer is requiring that applicants have verifiable references, do not smoke or drink while on duty and have the ability to read, write, and speak the Mandarin language.

The CO issued a Notice of Findings on May 19, 1995 (AF 29-36), proposing to deny certification because the Employer's experience requirement is unduly restrictive in violation of § 656.21(b)(2). Specifically, the CO found that the job opportunity should be classified as a Children's Tutor as opposed to a Tutor and, therefore, the two-year experience requirement exceeds the SVP for the job opportunity. The CO instructed the Employer to either delete the requirement and retest the labor market or to establish the business necessity of the requirement. In addition, the CO questioned whether the job opportunity represents full-time employment.

Accordingly, the Employer was notified that it had until June 23, 1995, to rebut the findings or to cure the defects noted.

In its rebuttal, dated June 16, 1995 (AF 10-23), Employer's Counsel argued that the job opportunity at issue in this case should be classified as a Tutor because the duties encompass the

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[1] All further references to documents contained in the Appeal File will be noted as "AF *n*," where *n* represents the page number.

[2] The Employer later stated that at the time of the rebuttal the children were 3, 5, and 7 years old (AF 10).

teaching of academic subjects. In addition, Employer's Counsel stated that the job opportunity constitutes full-time employment. The Employer submitted a schedule that the Alien will be required to follow along with a revised family schedule.

The CO issued the Final Determination on August 28, 1995 (AF 7-9), denying certification because the Employer failed to establish the business necessity of its experience requirement.

On September 25, 1995, the Employer requested review of the denial of labor certification (AF 2-6). In March 1996, the CO forwarded the Appeal File to the Board of Alien Labor Certification Appeals ("BALCA" or "Board"). The Employer filed a Brief on May 7, 1996.

Discussion

Section 656.21(b)(2) proscribes the use of unduly restrictive job requirements in the recruitment process. The reason unduly restrictive requirements are prohibited is that they have a chilling effect on the number of U.S. workers who may apply for or qualify for the job opportunity. The purpose of § 656.21(b)(2) is to make the job opportunity available to qualified U.S. workers. *Venture International Associates, Ltd.*, 87-INA-569 (Jan. 13, 1989) (*en banc)*. Where an employer cannot document that a job requirement is normal for the occupation or that it is included in the *Dictionary of Occupational Titles* (DOT), or where the requirement is for a language other than English, involves a combination of duties, or is that the worker live on the premises, the regulation at § 656.21(b)(2) requires that the employer establish the business necessity for the requirement.

The Board defined how an employer can show "business necessity" in *Information Industries, Inc.*, 88-INA-82 (Feb. 9, 1989) (*en banc)*. The *Information Industries* standard requires that the employer show the following: (1) that the requirement bears a reasonable relationship to the occupation in the context of the employer's business; and, (2) that the requirement is essential to performing , in a reasonable manner, the job duties as described by the employer. Failure to establish business necessity for an unduly restrictive job requirement will result in the denial of labor certification. *Robert Paige & Associates*, 91-INA-72 (Feb. 3, 1993); *Shaolin Buddhist Mediation Center*, 90-INA-395 (June 30, 1992).

The first issue that must be decided in this case is the proper DOT designation for this job opportunity. In the NOF, the CO found that the duties of this job opportunity more appropriately correspond to those of a Children's Tutor as opposed to a Tutor (AF 30). As such, the CO found the Employer's two-year experience requirement to be unduly restrictive and requested that the Employer establish the business necessity of the requirement (AF 31-32). In rebuttal, the Employer argued that the definition of Children's Tutor does not encompass the teaching of academic subjects and, therefore, the present job opportunity should be categorized as a Tutor.

Accordingly, the Employer argued that the two-year experience requirement is within the SVP[3] for the position and is not unduly restrictive (AF 10-11).

We agree with the CO and find that this job opportunity should be categorized as a Children's Tutor. On the ETA 750A form, the Employer listed the following as the job duties for the job opportunity at issue in this case:

> Provides a complete program of private instruction for three children, ages 2, 4 and 6 years old, in the Mandarin language and traditions, including: complete written and oral (both formal and conversational) communication skills, history and traditions in the private home. Assigns Mandarin literature for the children to read at the appropriate level in order to expand their vocabulary. Accompanies children to museums, performing art events, zoos and other educational establishments when parents are unavailable. Prepares lesson plans and confers with parents on the plans and the progress of each child.

(AF 38). Likewise, the DOT describes a Children's Tutor (DOT Code 099.227.010) in the following manner:

> Cares for children in private home, overseeing their recreation, diet, health and deportment: Teaches children foreign languages, and good health and personal habits. Arranges parties, outings, and picnics for children. . . ..

In comparison, the DOT describes a Tutor (DOT Code 099.227.034) as an individual who "teaches academic subjects, such as English, mathematics and foreign languages, to pupils requiring private instruction, adapting curriculum to meet individual's needs."

Initially, we note that the DOT is not to be applied in a pigeonhole fashion where there must be a complete matching of duties between the job offered and the DOT classifications in order for a job to be appropriately classified. *Trilectron Industries, Inc.*, 90-INA-188 (Dec. 19, 1991); *Trilectron Industries, Inc.*, 90-INA-176 (Dec. 19, 1991). In light of the ages of the children and the duties listed by the Employer on both the ETA 750A form and the schedule provided in rebuttal (AF 38, 18), we find that this job opportunity should be classified as a Children's Tutor which has a SVP of 5.[4] We note that Employer's Counsel argued in rebuttal that the Alien will be required to teach academic subjects such as writing, speech, history, and social studies (AF 11-12). However, this assertion is not supported by the job duties listed on the

[3] Specific Vocational Preparation is defined as the amount of lapsed time required by a typical worker to learn the techniques, acquire the information, and develop the facility needed for average performance in a specific job-worker situation. This training may be acquired in a school, work, military, institutional, or vocational environment.

[4] An SVP rating is a numerical rating. An SVP of 5 indicates that employers may require six months to one year of experience.

ETA 750A form or the schedule provided by the Employer in rebuttal (AF 38, 18).[5] Therefore, we agree with the CO and find that the Employer's two-year experience requirement is unduly restrictive. Because the Employer has not established the business necessity of this requirement in accordance with *Information Industries, supra,* we find that the Employer is in violation of § 656.21(b)(2). Accordingly, the CO's denial of labor certification is hereby AFFIRMED.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

For the Panel:

RICHARD E. HUDDLESTON
Administrative Law Judge

NOTICE OF PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary of Labor unless, within 20 days from the date of service, a party petitions for review by the full Board of Alien Labor Certification Appeals. Such review is not favored, and ordinarily will not be granted except: **(1)** when full Board consideration is necessary to secure or maintain uniformity of its decision; and, **(2)** when the proceeding involves a question of exceptional importance. Petitions for such review must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W., Suite 400
Washington, D.C. 20001-8002

Copies of the petition must also be served on other parties, and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced typewritten pages. Responses, if any, shall be filed within 10 days of service of the petition, and shall not exceed five double-spaced typewritten pages. Upon the granting of a petition, the Board may order briefs.

[5] Assertions by an employer's attorney that are not supported by underlying statements by a person with knowledge of the facts, do not constitute evidence. See *Moda Linea, Inc.*, 90-INA-424 (Dec. 11, 1991); *Mr. and Mrs. Elias Ruiz*, 90-INA-425 (Dec. 9, 199).